JOHN ANDREW HAWKINS

v.

THE QUEEN

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DAWSON,
TOOHEY & GAUDRON JJ
[F.C.94/042]
14 OCTOBER 1994

EVIDENCE*: Admissibility of record of interview between police officer and accused - Whether confession contained therein induced by representation made by person in authority - Accused told that blood sample from victim's hair same group as accused's blood - Sections 410(1)(9a) & (2) Crimes Act 1900 (NSW).*

The accused was convicted of abduction of and sexual intercourse with a girl aged 15 months, of inflicting actual bodily harm with intent to have sexual intercourse and assault occasioning actual bodily harm to the brother of the girl. He appealed to the Court of Criminal Appeal on the ground that the trial Judge wrongly admitted a record of interview made between a police officer and the accused after his arrest. He argued that the confession contained in the record of interview had been induced by an untrue representation made to him by a person in authority within the meaning of s.410(1)(a) of the Crimes Act 1900 (N.S.W.). The appeal was dismissed by a majority and the accused appealed to the High Court of Australia.

Held:

[1] The police officer informing the accused that the blood found on the victim's hair was the same blood group as the accused but not informing him that 37% of the population also had the same blood group induced the accused to confess because he thought, as the officer intended him to think, that the results of the blood test implicated him.

[2] The content of the words spoken depend upon their context. The message intended to be conveyed by the officer by the words he used was that the blood tests implicated him. The accused received this message and confessed.

[3] The trial Judge had misdirected himself in law by confining his attention to the meaning of the words in their strict sense, without examining what was said in the wider context.

[Appeal allowed. Retrial ordered]

Cases referred to:
Reg. v. Davidson [1895] 16 LR(NSW) 149 at 154 ***(refd)***
Reg. v. Connors [1990] 20 NSWLR 438 at 447, 449 ***(refd)***
McDermott v. The King [1948] 76 CLR 501 at 512 ***(refd)***
Walters v. Morgan [1861] 3 De G F & J 718 at 724 [45 ER 1056 at 1059] ***(refd)***
Turner v. Green [1895] 2 Ch 205 at 209 ***(refd)***

Legislation referred to:
Crimes Act 1900 (NSW), s. 410(1) (a)

For the appellant - T. Murphy, Legal Aid Commission of New South Wales
For the respondent - S.E.O'Connor, Solicitor for Public Prosecutions (NSW)

JUDGMENT

Mason C.J., Brennan, Dawson, Toohey and Gaudron JJ:

The appellant was convicted of four offences relating to events at a caravan park at Windang on the night of 23-24 December 1989. The offences included the abduction of and sexual intercourse with a girl aged 15 months, inflicting actual bodily harm with intent to have sexual intercourse and assault occasioning actual bodily harm to the brother of the girl. The appellant appealed against the convictions on the ground that the trial Judge was in error when he admitted into evidence a record of interview made on 17 January 1990. The Court of Criminal Appeal (McInerney and Badgery-Parker JJ.; Priestley JA dissenting) dismissed the appeal.

The division of opinion in the Court of Appeal related to the appellant's argument that the record of interview was inadmissible as it contained a confession which should not have been received into evidence because it had been induced by an untrue representation made to the appellant by a person in authority, within the meaning of s. 410(1) (a) of the Crimes Act 1900 (NSW). The majority rejected that argument along with other arguments which were advanced on behalf of the appellant.

The appeal to this Court challenges the correctness of the majority opinion on the s. 410(1)(a) point. The appeal also challenges the rejection by the Court of Criminal Appeal of other grounds argued in support of the inadmissibility of the record of interview. However, in view of the conclusion which we have reached in relation to the s. 410(1) (a) point, we shall confine our attention to that aspect of the appeal.

The facts

On 3 January 1990, the appellant was apprehended at Kings Cross by detectives investigating the offences, and at their request he agreed to go to Warilla to answer questions. On the way, he mentioned to the police officers certain matters unrelated to the offences under investigation - he was in breach of bail conditions arising out of an assault on his mother. He was arrested and charged with an offence relating to self-administration of amphetamines and perhaps with another offence in relation to breach of bail conditions, though that is not entirely clear. He was kept in a holding cell at Warilla until he was taken before the local Court on 4 January.

The appellant was then 18 years old. He had been unemployed since leaving school at the age of 14 when he was in year seven. On the night when the offences were committed, he had injected himself with amphetamines. During the time he was at Warilla, he was taken to Shellharbour Hospital for treatment for drug withdrawal symptoms and chicken pox.

On 3 January at Warilla police station he consented to a sample of his blood being taken for testing and comparison with blood samples from a hair found on the child and believed to have come from her attacker. After being questioned, he signed a record of interview which did not contain any admissions. However, he remained the prime suspect.

He appeared in the local Court on 4 January. The hearing of the unrelated charges was adjourned and he was remanded in custody. Although the remand warrant commanded the police to convey the appellant to the prison at Malabar and to deliver him to the Keeper of that prison and commanded the Keeper to keep him there until the remand date, he was returned to the holding cell at Warilla where he remained until the morning of 18 January 1990.

When evidence of the confession and record of interview on 17 January was tendered at the trial, the evidence was objected to on the ground that it was not voluntary. A *voir dire* hearing took place. In the course of that hearing, detective Griffin gave this evidence:

> Q. As at 3 January 1990, the only reason you were aware why the accused was held at Warilla was that you knew police wanted to speak to him and were waiting for the results of the blood test? A. Yes.
>
> Q. In reality, that was you who wanted to speak to him and you who was waiting for the results of the blood test? A. Certainly. I was in charge of the investigation, yes.
>
> Q. It would be fair to say the only reason you knew at the time he was being held in the cells was so that the results of the blood tests could arrive or be conveyed and then you could ask him more questions following that? A. Yes.
>
> Q. It follows from what you have told us, does it not, that without the blood test, you had no expectation that he would give any information to the police further to that which he gave on 3 January? A. No."
>
> ...
>
> Q. [As at 17 January] He had already been in custody for fourteen days? A. Correct, yes.
>
> Q. He was approached a number of times by police? A. At least by one and perhaps more police to ask if he would be prepared to talk to me about this matter, yes.
>
> Q. The sole reason you knew of why he was in gaol, he was awaiting blood tests? A. Yes."
>
> Q. Picked up at Sydney and taken to Wollongong? A. Yes.
>
> Q. Questioned about defence denials? A. Yes.
>
> Q. Held in policy custody fourteen days? A. Yes.
>
> Q. Following Court appearance where he is represented? A. Yes.
>
> Q. At least one and perhaps more police involved in the investigation approached him to give a statement and he says, 'No, not yet'? A. Yes.

Detective Griffin admitted that on 17 January he knew that the appellant had been in custody for the previous 14 days and that he was suffering from withdrawal symptoms from drug addiction. Detective Griffin had obtained information about the result of the blood tests from another police officer, Sergeant Neal, on 17 January. Detective Griffin gave this evidence of his understanding of the significance of the blood tests at the time of his interview with the appellant on that day:

> Q. You knew, even at that stage, where you had this information from Neal about the blood group that that was not enough? A. Oh no, that could have been very sparse. The blood group doesn't take it very far.
>
> ...
>
> Q. You knew at the time you spoke to the accused you had a blood group or that was your belief, you would say? A. Yes.
>
> Q. But notwithstanding that, as you have already told us, the blood, grouping is a wide spectrum? A. Yes.
>
> Q. It could have easily led to other people apart from Hawkins? A. Oh yes.
>
> Q. So you knew you still needed the record of interview and admissions if you were going to charge him? A. Yes.

...

Q. All right. You told him the information about the blood group? A. Yes.

Q. You left him there to ponder what you had told him? A. Yes.

Q. With the hope he would come forward and give an interview? A. Certainly I hoped that would be the case, Yes.

Q. You knew at the time and prior to speaking to him at 9.30 pm on that night that blood grouping, if positive, was not exclusionary but that is as far as it went? A. That's right.

...

Q. It was obviously very critical and important evidence? A. Yes.

Q. If you presented a suspect with that, then the likelihood of him giving some confession was far greater because he then knew the game was up, so to speak, in the light of positive scientific evidence connected with the crime? A. That may be so. If you had a fingerprint or something that connected one particular person with one crime. In this case, a blood grouping didn't do that.

Q. Yet you did not say to the accused anything along the lines, 'Well, look it's only a blood group, it doesn't positively connect you to the crime but it gives me a reason to want to ask you more questions' or anything like that? A. I didn't say that to him.

Q. Yet you knew the blood group did not positively connect him? A. Connect him as far as blood group but that is as far as it went.

Q. You knew the blood group wasn't enough? A. That's correct, yes.

Q. Because this blood group of the accused is that held by 37 or 38 per cent of the population? A. Whatever it is, I know it is a fair amount, yes.

Q. It is a large spectrum of the population? A. Yes.

A statement made by detective Griffin on 22 January 1990 describing the events on 17 January immediately before the appellant's confession was admitted into evidence without objection during the *voir dire* hearing. That statement contained this passage:

> About 9.30 pm with detective McDougall I saw the defendant John Andrew Hawkins in the cells at the Warilla Police Station. I then said to him, 'I am detective Griffin and this is detective McDougall. I am shortly going to ask you some further questions about the abduction and sexual assault upon a 15 month old girl at the Oaklands Caravan Park about 2 am on 24 December 1989 and about the assault upon the child's mother and brother. Do you remember being spoken to about this before?' He said, `Yes.' I said, `I will tell you now that specimens taken from that little girl have been analysed and compared with a blood sample that you gave. These tests have found that you are of the same blood group as that of the offender. Do you understand that?' The defendant lowered his head and said, `Yes.' I said, `I want you to think about this matter and I will be back shortly to talk to you.' We then left the cell area.

The statement went on to recount that, after the two detectives returned to the appellant's cell a short time later, they took him to an interview room where he confessed to the offences and signed a record of interview containing the confession. The record of interview states that the interview commenced at 11.05 pm, that it was interrupted between 1.14 and 2.50 am in order to visit the caravan park and that it ended at 4.00 am.

Detective Griffin's statement that the tests showed that the appellant was of the same blood

group as the offender was true but the detective did not go on to inform the appellant that approximately 37 per cent of the population are of the same blood group as the appellant and the offender.

The trial Judge (Newman J) ruled that the confessional evidence was admissible. But, in the course of the reasons given for that ruling, Newman J said that the appellant "decided to enter into the record of interview as a consequence of [detective] Griffin advising him of the result of the blood analysis."

Section 410

Section 410(1)(a) provides:

> No confession ... shall be received in evidence against an accused person if it has been induced:
>
> (a) by any untrue representation made to him by ... some person in authority.

Sub-section (2) provides:

> Every confession ... made after any such representation ... shall be deemed to have been induced thereby, unless the contrary be shown.

It has been held that the words "untrue representation" in s. 410(1) (a) mean a representation which is wilfully untrue, made with the object of inducing a confession. See *Reg. v. Davidson* [1895] 16 LR(NSW) 149 at 154 (A case dealing with an ancestor of the present s. (1) (1); *Reg. v. Connors* [1990] 20 NSWLR 438 at 447, 449. The interpretation thus placed upon the provision ascribes to it the purpose of rendering inadmissible confessions induced by false representations made by persons in authority with a view to securing confessions, while leaving admissible confessions induced by misrepresentations which are innocent or not intended to induce a confession. The authority which supports the prevailing interpretation is long standing. But the adoption of that interpretation is not a reason for thinking that the purpose of the provision is to inhibit serious misconduct on the part of persons in authority rather than to protect persons who are induced to make a confession by a misrepresentation. The purpose of the provision is to protect the individual who is induced to make a confession by an untrue representation made by a person in authority, just as the common law rule protects an accused who is induced to make a confession by a threat or promise made by such a person. See *McDermott v. The King* [1948] 76 CLR 501 at 512 per Dixon J.

The words spoken were true so far as they went. But, as Priestley JA pointed out, they did not state the complete truth. That would not matter if, in determining what is an untrue representation of the purpose of s. 410(1)(a), we were confined to looking at the words alone and dissociated from their context. But it would be contrary to both common sense and settled principle to adopt that approach. A representation may be made by acts and conduct as well as words or by a combination of words, acts and conduct. As Lord Campbell LC observed in *Walters v. Morgan* [1861] 3 De G F & J 718 at 724 [45 ER 1056 at 1059]; see also *Turner v. Green* [1895] 2 Ch 205 at 209 per Chitty J:

> a nod or a wink, or a shake of the head, or a smile

may constitute a representation. Likewise, the content of a representation (which is ordinarily a question of fact) is to be ascertained, where appropriate, by reference to the circumstances in which it was made and the matters to which it related. So, in the present case, the content of the words spoken depended upon their context. That context comprehended not only the situation in which the police officers and the appellant were placed when the words were spoken but also the relationship between them as it existed up to that time.

Critical to that relationship were the facts that the appellant had been in custody for 14 days and that the police were holding him knowing that, in the absence of the results of the blood test, it was unlikely that he would make a statement but hoping that he would make a statement if he were left to consider the results of the test once they became available. Critical also was the fact that detective Griffin knew that a record of interview was essential before the appellant could be charged. Without an admission of guilt there was, at that time, insufficient evidence to support the laying of a charge against the appellant.

These facts support the conclusion reached by Priestley J.A. in the Court of Appeal that detective Griffin intended, without using words which, viewed in isolation, were untrue, to represent to the appellant that the result of the blood tests was a significant matter pointing to the guilt of the appellant in connection with the offences for which he was charged. The facts also support the finding of the trial Judge that the appellant was induced by the statement made by detective Griffin to confess. Plainly enough, the appellant was so induced because he thought, as detective Griffin intended him to think, that the results of the blood tests implicated him in the commission of the offences under investigation.

No doubt a distinction should be drawn between the intention of the representor and the context in which the representation, whatever it may be, is made. But, in determining what representation was made, it may be relevant to ascertain what the representor intended to convey by the words chosen. If the representor intended to convey what the representee understood them to mean, the representor's intention may provide support for the view that, in the context in which they were used, the words should be understood in that sense and amounted to a representation to that effect. So, if the representor used words which he or she intended should be understood in a particular extraordinary sense and believed that the representee would so understand them, that would be a material consideration in determining what the representation was. In the present case, the evidence does not establish that detective Griffin believed that the appellant would understand the communication about the results of the blood tests as a representation that they implicated the appellant, but the evidence justifies the inference that detective Griffin intended and hoped that this would be the case.

In this respect, the terms of the statement made to the appellant at 9.30 pm on 17 January are important. The actual statement about the results of the tests was followed by the question: "Do you understand that?" After the appellant lowered his head and responded in the affirmative, detective Griffin said:

> I want you to think about this matter and I will be back shortly to talk to you.

Why, one might ask, should the appellant be requested to "think about this matter" unless the speaker was suggesting to the appellant that the information previously communicated was such as to implicate him? Accordingly, in the light of the context, including the intention of detective Griffin, and the relationship between the police officers and the appellant, as we have described them, the statement made to the appellant at 9.30 pm on 17 January should be understood as a representation that the results of the blood tests implicated the appellant.

That was the message which detective Griffin intended to convey to the appellant by the words which he used and it was the message which the appellant received. The case is therefore to be distinguished from other cases in which the words used, when properly considered in the light of their context, including the intention of the representor, are incapable of sustaining the message which the representee claims to have derived from the words. Likewise, this case is to be distinguished on its facts from examples given by Badgery-

Parker J in the Court of Criminal Appeal of statements made by police officers to suspects in which attention is drawn to a characteristic possessed by the suspect and the offender (red hair) or a characteristic of the suspect's motor vehicle and the offender's motor vehicle (model and colour). These examples concern characteristics which, by reason of their prevalence, are known not to implicate the suspect and they lack the context and the words which give significant complexion to the statement made by detective Griffin.

It remains only for us to say that the trial Judge misdirected himself in law by confining his attention to the meaning of the words used in their strict sense, without endeavouring to examine what was said in the wider context. The trial Judge's ruling on the s. 410(1)(a) point therefore involved an error of law. Accordingly, the record of interview was inadmissible.

In the result, the appeal should be allowed. The order of the Court of Criminal Appeal should be set aside. In lieu thereof the appeal to that Court should be allowed, the convictions quashed and a retrial ordered.